

Guide to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

October 2023

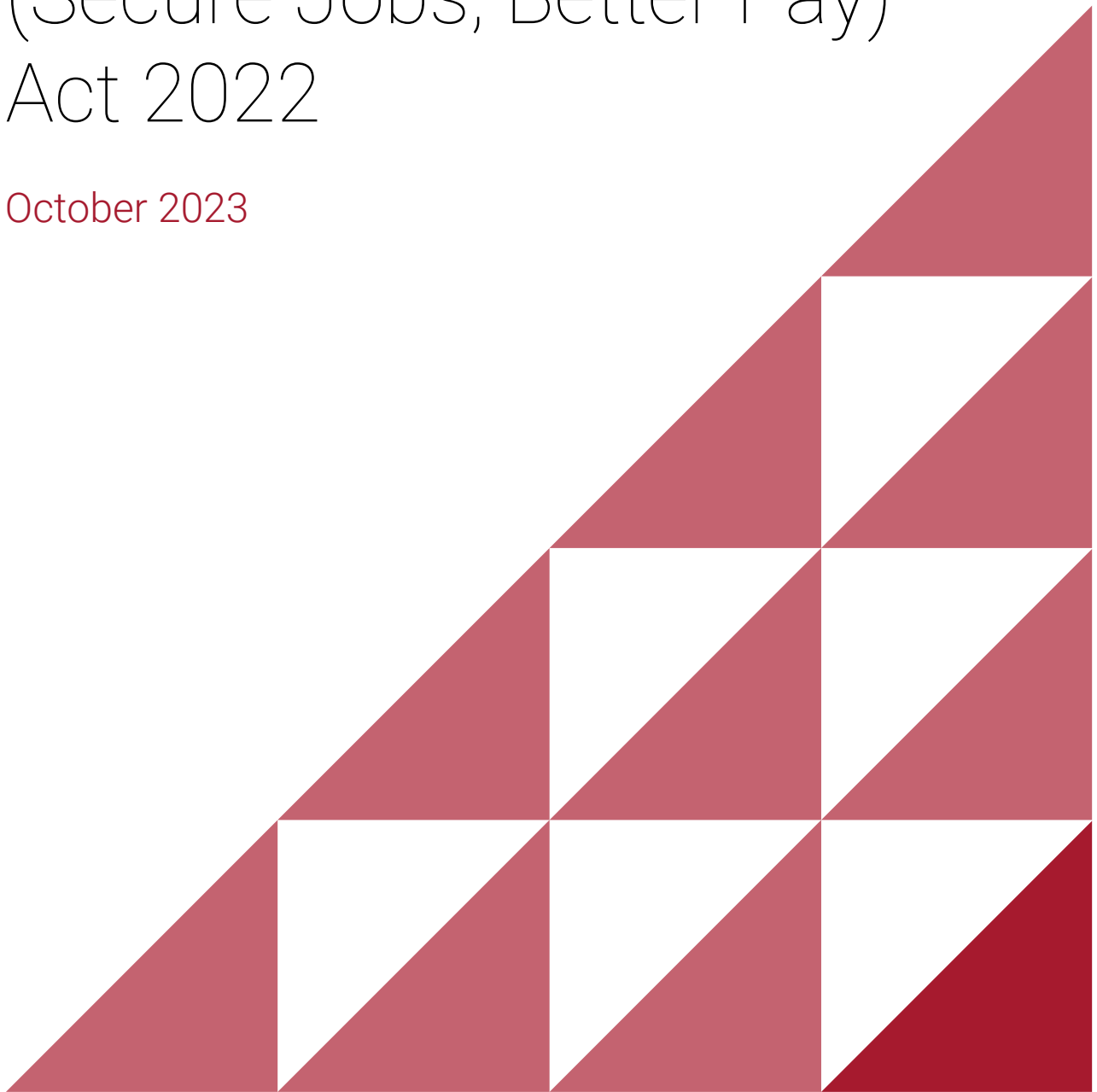


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1. INTRODUCTION

On 2 December 2022, the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) (Cth) (**Amendment Act**) was passed by the Commonwealth Parliament and received Royal Assent on 6 December 2022.

This report provides an overview of major changes to the *Fair Work Act 2009 (Cth)* (**FW Act**) (and other laws) introduced through the Amendment Act.

These are the key changes:

- Provided a new scheme for multi-enterprise bargaining that gives unions much stronger rights to either require employers to engage in this form of bargaining or to draw them into a ‘multi-enterprise agreement’ that has been struck with other employers.
- Introduced changes to enterprise agreement making more broadly, including:
 - changed the way that the Better Off Overall Test (**BOOT**) is applied;
 - introduced a new power for the Fair Work Commission (**FWC**) to reassess the BOOT during the life of an enterprise agreement;
 - changed the process that an employer must follow when making an enterprise agreement and the powers of the FWC when approving an agreement; and
 - gave new rights for bargaining representatives to initiate bargaining for the replacement of a nominally expired enterprise agreement.
- Afforded the FWC a new power to resolve ‘intractable bargaining disputes’ through arbitration.
- Imposed new limitations upon the circumstances in which an enterprise agreement may be terminated.
- Introduced a new prohibition against sexual harassment (attracting a civil penalty) combined with an expanded dispute resolution jurisdiction in the FWC to deal with sexual harassment disputes.
- Created new anti-discrimination obligations on employers in respect of breastfeeding, gender identity and intersex status.
- Created new workplace rights for employees to disclose, not to disclose, and ask another about their remuneration and other certain conditions, in addition to prohibiting clauses in contracts of employment and fair work instruments that are inconsistent with these new workplace rights.
- Made various changes which enhanced the capacity of the FWC to address pay equity.
- Imposed new obligations and civil penalty provisions on employers in relation to employee requests for flexible work arrangements and unpaid parental leave extensions, while enabling the FWC to arbitrate disputes.

- Introduced significant restrictions on the use of fixed term contracts, with some important exceptions.
- Implemented a ban on job advertisements that advertise below minimum rates of pay.
- Provided for the sunseting of ‘zombie agreements’.
- Significantly expanded the small claims jurisdiction, which makes it much easier for parties to pursue underpayment claims.
- Abolished the Australian Building and Construction Commission (**ABCC**) and the Registered Organisations Commission (**ROC**).
- Introduced new payslip requirements relating to the taking of paid family and domestic violence leave.

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 can be found [here](#).

2. COMMENCEMENT DATES

The changes introduced through the Amendment Act commence operation at different times.

The operative dates for the key changes introduced by the Amendment Act are set out in each section of this report and are summarised here for convenience.

You may use the hyperlinks to read the relevant more detailed section in the report.

7 December 2022

- [Initiating bargaining for single-enterprise agreements](#)
- [Dealing with errors in enterprise agreements](#)
- [Termination of enterprise agreements after the nominal expiry date](#)
- [Sunsetting of ‘zombie’ agreements](#), however the automatic cessation of ‘zombie agreements’ will be on 7 December 2023 (unless otherwise extended)
- [Prohibition on pay secrecy](#)
- [Prohibition on job advertisements that breach the FW Act](#)
- The [new protected attributes](#) added to the anti-discrimination framework
- [Changes to equal remuneration principles and the Objects of the FW Act in respect of pay equity](#)

1 February 2023

The [payslip](#) requirements relating to the taking of family and domestic violence leave under the NES commenced 1 February 2023 for employers other than small business employers

and on 1 August 2023 for small business employers.

6 February 2023

The [abolition](#) of the ABCC and the ROC and the transfer of regulatory functions to the Fair Work Ombudsman (FWO) and the FWC.

6 March 2023

- [Prohibiting sexual harassment](#) in connection with work.
- The establishment of [two new FWC Expert Panels](#).

6 June 2023

- [Flexible work](#): changes to requests and arbitration of disputes
- Requests for extension of [unpaid parental leave](#): changes and dispute resolution
- [Changes to enterprise agreement approval processes](#) and the [BOOT](#), except the new provisions dealing with errors in enterprise agreements
- [Single interest employer authorisations and agreements](#)
- [Supported bargaining authorisations and agreements](#)
- [Cooperative workplace agreements](#)
- [Varying multi-enterprise agreements](#) to remove employers and their employees
- [Intractable bargaining disputes and arbitration](#)
- [Industrial action](#)

1 July 2023

- Changes to the [small claims jurisdiction](#)
- The establishment of the [National Construction Industry Forum](#)

6 December 2023

- The limitation on [fixed term contracts](#)
- [Zombie agreements](#) sunset on 7 December

3. MULTI-ENTERPRISE BARGAINING

The Amendment Act significantly varied and expands the availability and operation of multi-enterprise bargaining under the FW Act.

Three streams

It provided for 3 streams of multi-enterprise bargaining:

- single interest employer agreements
- supported bargaining agreements
- cooperative workplaces agreements.

Reduces barriers

In broad terms, the Amendment Act reduced the barriers to parties accessing multi-enterprise bargaining.

It provided greater power for bargaining representatives (typically unions) to compel employers to either engage in multi-enterprise bargaining or to be brought within the coverage of a multi-enterprise agreement that has been struck with other employers.

Protected industrial action

Protected industrial action is permitted to be taken in two of the three multi-enterprise bargaining streams (the 'supported bargaining' and 'single interest' streams).

Protected industrial action is not permitted in the 'cooperative workplace' stream.

Union veto

A union with one member covered by a multi-enterprise agreement is now able to prevent such agreement (which may apply extensively across numerous employers and thousands of employees) from ever being varied to remove an employer and its employees from coverage.

Changes are contentious

The changes have been particularly contentious and have the potential to significantly alter the way in which bargaining occurs in Australia.

Commencement date

6 June 2023

4. NEW RIGHTS FOR UNIONS TO INITIATE BARGAINING (SINGLE-ENTERPRISE AGREEMENT)

The Amendment Act enabled a bargaining representative to initiate bargaining for a single-enterprise agreement to replace an expired enterprise agreement without first securing the agreement of the employer or a majority support determination.

The effect of that is an employer is then required to bargain in good faith even though they have no desire to bargain.

If the employer refuses to bargain, the bargaining representative can apply to the FWC for bargaining orders.

Commencement date

6 June 2023

5. ENTERPRISE AGREEMENT APPROVAL PROCESS

The Amendment Act removed various prescriptive pre-approval steps that an employer must take within strict timeframes to satisfy the FWC that an enterprise agreement has been genuinely agreed to.

Instead, there is an overarching requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed.

The FWC published a [Statement of Principles on Genuine Agreement](#) which contains guidance for employers about how they can ensure employees have genuinely agreed to an enterprise agreement in accordance with the overarching requirement.

The Amendment Act retained the requirement for an employer to take all reasonable steps to explain the terms of the agreement, and the effect of those terms, to the employees before the voting process starts.

Commencement date

6 June 2023

6. CHANGES TO THE BOOT

The Amendment Act changed the manner in which the BOOT is applied by the FWC but has also empowered the FWC to make changes to a proposed agreement in order to be satisfied that it will pass the BOOT.

In certain circumstances, the FWC may undertake a reassessment of the BOOT in relation to an agreement that is in place and make retrospective amendments to the agreement.

Employers will not be liable for civil penalties arising from any consequent agreement contraventions but may be liable to compensate affected employees.

Commencement date

6 June 2023

7. INTRACTABLE BARGAINING DISPUTES & ARBITRATION

The Amendment Act enabled arbitration in the context of 'intractable bargaining disputes' where there is no reasonable prospect of agreement being reached after a 9 months' 'minimum bargaining period' and it is 'reasonable in all the circumstances'.

The FWC must consider the significance to employees of existing agreement conditions when they undertake an arbitration.

Commencement date

6 June 2023

8. INDUSTRIAL ACTION

The Amendment Act:

- introduced a requirement for bargaining representatives to attend a compulsory conciliation conference before or on the day voting closes on a protected action ballot
- established a new requirement to provide a minimum of 120 hours' (i.e., 5 days') notice before industrial action can be taken in the context of bargaining in the single interest employer or supported bargaining streams.

Commencement date

6 June 2023

9. FLEXIBLE WORK ARRANGEMENTS

The Amendment Act expanded the NES eligibility criteria in which an employee may request a flexible working arrangement to include where they, or a member of their immediate family or household, experiences family or domestic violence or where the employee is pregnant.

New requirements regarding responding to requests for flexible work arrangements under the NES now reflect those contained in modern awards.

The FWC is empowered to deal with disputes regarding requests for flexible working arrangements under the NES by way of mediation and conciliation in the first instance and by compulsory arbitration.

In exercising its arbitration powers, the FWC may make a range of orders including an order that the employer grant the employee's request.

The Amendment Act imposed civil penalties for employers who contravene the amended NES provisions, including where employers refuse a request to change working arrangements in the absence of reasonable business grounds.

Commencement date

6 June 2023

10. REQUEST FOR EXTENSION OF UNPAID PARENTAL LEAVE

The Amendment Act created new obligations for employers who receive requests by eligible employees to extend a period of unpaid parental leave by up to 12 months (after the initial 12 months' period) - up to a total period of 24 months.

Employers must now respond to requests to extend unpaid parental leave in a similar way to the new procedural obligations in modern awards applying to flexible work requests.

The FWC is now empowered to deal with the disputes regarding requests for an extension to a period of unpaid parental leave by way of mediation and conciliation in the first instance and by compulsory arbitration.

In exercising its arbitration powers, the FWC may make a range of orders including an order that the employer grant the employee's request for extended parental leave or for another identified period.

There are new civil remedy provisions for an alleged contravention of a provision in respect of unpaid parental leave extension requests and/or a contravention of a FWC order.

Commencement date

6 June 2023

11. TERMINATION OF ENTERPRISE AGREEMENTS AFTER THEIR NOMINAL EXPIRY DATE

The Amendment Act introduced a significantly more confined test for the termination of a nominally expired enterprise agreement at the initiative of an employer.

Commencement date

7 December 2022

12. SUNSETTING OF 'ZOMBIE' AGREEMENTS

All 'zombie agreements' will automatically cease to operate on 7 December 2023 (unless this period is extended by the FWC for a particular agreement).

Employers were required to give affected employees notice of the automatic sunsetting by 6 June 2023, including information about the timing and the FWC's role in extending the default period (failing to do so was a breach of a civil penalty provision).

Commencement date

7 December 2022

13. SEXUAL HARASSMENT AT WORK

The Amendment Act:

- prohibits sexual harassment in connection with work, which applies broadly to workers, prospective workers and persons conducting a business or undertaking - principals (employers and persons conducting a business or undertaking) may be vicariously liable for acts of their employees or agents
- introduces a new conciliation/mediation process in the FWC, which:
 - gives the FWC power to make stop sexual harassment orders or otherwise deal with a sexual harassment dispute;
 - enables parties to proceed to consent arbitration (for applications that do not solely consist of an application for a stop sexual harassment order) or enables a person to make an application to the Federal Court within 60 days if conciliation/mediation is unsuccessful.
- introduces new civil penalty provisions for employers and persons who contravene the sexual harassment prohibition or who contravene FWC orders.

Commencement date

6 March 2023

14. PAY SECRECY

The Amendment Act created a new workplace right allowing employees to ask one another about, as well as to disclose, or not disclose, their remuneration and any terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes.

A term of an employment contract or a fair work instrument that is inconsistent with this workplace right will have no effect.

An employer entering into a contract of employment or other written agreement with an employee that includes a term that is contrary to the new prohibitions will be liable for a civil penalty.

Commencement date

7 December 2022

15. FIXED TERM CONTRACTS

The Amendment Act limits the use of fixed term contracts for the same role beyond two years (including renewals) or two consecutive contracts - whichever is shorter, subject to certain exceptions.

A new 'Fixed Term Contract Information Statement' must be provided to all employees entering into a fixed term contract. Failure to do so gives rise to a civil penalty.

Where a fixed term contract is made in breach of the new provisions, the employee would be considered a permanent employee and the expiry date of the fixed term contract is of no effect.

Commencement date

6 December 2023

16. SMALL CLAIMS

From 1 July 2023, the Amendment Act increases the maximum monetary threshold on amounts that can be awarded in small claims proceedings from \$20,000 to \$100,000.

The Amendment Act also enables a court to award a successful claimant any filing fees from the other party.

Commencement date

1 July 2023

17. JOB ADVERTISEMENTS

The Amendment Act prohibits employers from advertising a job with a pay rate that would breach the FW Act or any fair work instrument, including a modern award or enterprise agreement.

Advertisements must include specific piece rates to which a pieceworker would be entitled.

The Amendment Act also introduced a new civil remedy provision enabling Fair Work Inspectors and unions to commence legal proceedings for breaches of this provision.

Commencement date

7 December 2022

18. ANTI-DISCRIMINATION

The Amendment Act introduced three new additional protected attributes to the provisions that provide protections against discrimination, namely breastfeeding, gender identity and intersex status.

It also provided that 'special measures to achieve equality' are matters that are not discriminatory and therefore not unlawful terms in an enterprise agreement.

Commencement date

7 December 2022

19. JOB SECURITY AND GENDER EQUALITY

Job security and gender equality are new objects in the FW Act and are matters that must be considered under the Modern Awards Objective. Gender equality has also been inserted into the Minimum Wages Objective.

It is easier to successfully bring an equal pay case and the FWC is empowered to make an equal remuneration order on its own initiative.

The FWC must consider whether work has historically been undervalued because of gender based assumptions in work value cases.

New Expert Panels have been established within the FWC, namely an Expert Panel for Pay Equity and an Expert Panel for the Care and Community Sector.

Commencement date

6 March 2023

20. FAMILY AND DOMESTIC VIOLENCE LEAVE – PAY SLIP REQUIREMENTS

Where an employer provides a pay slip to an employee who takes paid family and domestic violence leave under the NES, the pay slip must not contain any information prescribed by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

This will generally mean that employers are not to disclose on an employee's pay slip that the employee has taken paid family and domestic violence leave.

Commencement date

1 February 2023 (1 August 2023 for small business employers)

21. TRANSFERS OF REGULATORY FUNCTIONS

The ABCC has been abolished and its regulatory function has been transferred to the FWO.

The ROC has been abolished, and its function has been transferred to the General Manager of the FWC.

Commencement date

6 February 2023

22. ESTABLISHMENT OF THE NATIONAL CONSTRUCTION INDUSTRY FORUM

On 1 July 2023, the National Construction Industry Forum (**NCI Forum**) was established.

The NCI Forum provides advice to the Government on matters relating to work in the building and construction industry, including but not limited to workplace relations, skills and training, safety, productivity, diversity and gender equality and industry culture.

Commencement date

1 July 2023

NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters.
- Leading and influencing the workplace relations policy agenda.
- In collaboration with Members, developing policy proposals for worthwhile reforms to workplace relations laws.
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system.
- Writing submissions, preparing evidence and appearing in major cases in the Fair Work Commission (FWC).
- Representing Members' interests in modern award cases and reviews.
- Representing Ai Group Members collective interests in significant cases in Courts.
- Representing individual Ai Group Members in significant cases in the FWC and Courts.
- Keeping Ai Group Members informed and involved in workplace relations developments.
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence policy developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum.
- Liaising with regulators including the Fair Work Ombudsman and Departmental officials.
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, Royal Commissions, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others.
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.

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